

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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NATIONAL STUDENT LEGAL DEFENSE  
NETWORK,  
1015 15th Street NW, Suite 600  
Washington, DC 20005

*Plaintiff,*

v.

UNITED STATES DEPARTMENT OF  
EDUCATION,  
400 Maryland Avenue SW  
Washington, DC 20202

*Defendant.*

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Case No. 19-cv-3264

**COMPLAINT**

1. Plaintiff National Student Legal Defense Network (“Student Defense”) brings this action against Defendant United States Department of Education (“ED”) under the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

**JURISDICTION AND VENUE**

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, 2202.
3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).
4. Because Defendant has failed to comply with the applicable time limit provisions of FOIA, Student Defense is deemed to have exhausted its administrative remedies pursuant to 5

U.S.C. § 552(a)(6)(C)(i) and is now entitled to judicial action enjoining the agency from continuing to withhold agency records and ordering the production of agency records improperly withheld.

## **PARTIES**

5. Plaintiff Student Defense is a nonpartisan, non-profit organization incorporated in the District of Columbia. Student Defense's mission is to work, through a variety of means, to advance students' rights to educational opportunity and ensure that higher education provides a launching point for economic mobility. To further its mission, Student Defense gathers information, including through responses to FOIA requests submitted to government agencies, and publicizes these responses via, *inter alia*, its website, social media, press releases and other comments to the media, and regulatory comments to government agencies.

6. Defendant ED is a department of the executive branch of the United States government headquartered in the District of Columbia and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). ED has possession, custody, and control of the records that Student Defense seeks.

## **STATEMENT OF FACTS**

### *First 2016 Borrower Defense Rule Implementation Request*

7. On May 15, 2019, Student Defense submitted a FOIA request to ED seeking information received from institutions of higher education and other members of the public in response to ED's Electronic Announcement, dated March 15, 2019, regarding certain steps for implementing the 2016 Borrower Defense Rule (the "First Request"). The Announcement instructed institutions of higher education to provide, within sixty days, certain notifications to the Department, including debts, liabilities, and losses; non-Title IV revenue; certain actions by

the Securities and Exchange Commission or other stock exchanges; and other discretionary factors or events. *See* Office of Postsecondary Educ., U.S. Dep’t of Educ., *Guidance Concerning Some Provisions of the 2016 Borrower Defense to Repayment Regulations* (Mar. 15, 2019), <https://ifap.ed.gov/eannouncements/030719GuidConcernProv2016BorrowerDefensetoRypmtRegs.html>; *see also* 34 C.F.R. § 668.171.

8. The First Request sought the following records:
  - a. All documents, including emails and attachments, sent to the [ESAERN@ed.gov](mailto:ESAERN@ed.gov) email address between March 15, 2019, and the date of this Request;
  - b. To the extent not captured by the above request, any documents constituting notifications to the Department, including its office of Federal Student Aid, that were provided under the requirements of 34 C.F.R. § 668.171(h); *and*
  - c. All documents constituting comments submitted by any member of the public on the guidance contained in the Announcement.
9. ED assigned the First Request tracking number 19-01462-F.
10. On June 7, 2019, ED notified Student Defense that it was “unable to provide an estimated completion date,” but that it “intend[ed] to provide records on a rolling basis as they become available.”
11. On August 7, 2019, ED notified Student Defense that it had “received responsive documents from one of the two subject matter experts,” but that “[t]he file size exceed[ed] email capacity.” ED requested that Student Defense choose a delivery method (via CD-ROM or ED’s online “PAL” system) to receive the documents.
12. On August 8, 2019, Student Defense informed ED that it preferred to receive the documents via the PAL system. That same day, ED acknowledged this selection and explained that it was “waiting for the final review before releasing the documents.” ED further stated that

it did not “have a timeline for the final review,” but once “[ED] receive[s] approval, the docs will be delivered . . . and you can download them immediately.”

13. On August 13, 2019, ED granted Student Defense’s request for a fee waiver.

14. On October 28, 2019, Student Defense requested a status update on the First Request.

15. On October 29, 2019, ED responded that it “currently do[es] not have an estimated completion date” and apologized for the “extreme delay.”

16. ED’s website shows that Student Defense’s First Request is still “In Process.” See U.S. Dep’t of Educ., FOIA Request Status, <https://foiaexpress.pal.ed.gov/app/CheckStatus.aspx> (last visited Oct. 30, 2019).

17. Student Defense has not received any further communication from ED regarding the First Request.

*Second 2016 Borrower Defense Rule Implementation Request*

18. On May 20, 2019, ED issued a second Electronic Announcement regarding the notification requirement contained in the 2016 Borrower Defense Rule. In this Announcement, ED stated that “[r]ecently[,]” it “ha[d] received a number of inquiries as to the implementation of the guidance in the Electronic Announcement relating to the reporting requirements in the financial responsibility regulations.” Office of Postsecondary Educ., U.S. Dep’t of Educ., *Questions Regarding the Financial Responsibility Provisions of the 2016 Borrower Defense Regulations* (May 20, 2019),

<https://ifap.ed.gov/eannouncements/052019QuestionFinancialResponProvision2016BorrowDefenRegulate.html>.

19. On May 21, 2019, Student Defense submitted a second FOIA request to ED seeking information related to this Announcement (the “Second Request”).

20. The Second Request sought the following records:

To the extent not captured by the previously submitted FOIA (No. 19-01462), all documents constituting or reflecting any “inquiry as to the implementation of the guidance in the Electronic Announcement relating to the reporting requirements in the financial responsibility regulations,” as that phrase was used in the May 20, 2019 Electronic Announcement.

21. ED assigned the Second Request tracking number 19-01511-F.

22. On June 20, 2019, ED notified Student Defense that it was “unable to provide an estimated completion date,” but that it “intend[ed] to provide records on a rolling basis as they become available.”

23. On August 14, 2019, ED granted Student Defense’s request for a fee waiver.

24. On October 28, 2019, Student Defense requested a status update on the Second Request.

25. On October 29, 2019, ED responded that it “currently do[es] not have an estimated completion date” and apologized for the “extreme delay.”

26. ED’s website shows that Student Defense’s Second Request is still “In Process.” See U.S. Dep’t of Educ., FOIA Request Status,

<https://foiaexpress.pal.ed.gov/app/CheckStatus.aspx> (last visited Oct. 30, 2019).

27. Student Defense has not received any further communication from ED regarding the Second Request.

*Exhaustion of Administrative Remedies*

28. As of the date of this complaint, ED has failed to (a) notify Student Defense of any determination regarding the First Request or Second Request (together, the “FOIA

Requests”), including the scope of any responsive records ED intends to produce or withhold and the reasons for any withholdings; or (b) produce the requested records or demonstrate that the requested records are lawfully exempt from production.

29. Through ED’s failure to respond to the FOIA Requests within the time period required by law, Student Defense has constructively exhausted its administrative remedies and seeks immediate judicial review.

**COUNT I**  
**Violation of FOIA, 5 U.S.C. § 552**  
**Failure to Conduct Adequate Search for Responsive Records**

30. Student Defense repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

31. Student Defense properly requested records within the possession, custody, and control of ED.

32. ED is an agency subject to FOIA and must therefore make reasonable efforts to search for requested records.

33. ED has failed to promptly review agency records for the purpose of locating those records that are responsive to the FOIA Requests.

34. ED’s failure to conduct an adequate search for responsive records violates FOIA.

35. Plaintiff Student Defense is therefore entitled to injunctive and declaratory relief requiring Defendant to promptly make reasonable efforts to search for records responsive to the FOIA Requests.

**COUNT II**  
**Violation of FOIA, 5 U.S.C. § 552**  
**Wrongful Withholding of Non-Exempt Responsive Records**

36. Student Defense repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

37. Student Defense properly requested records within the possession, custody, and control of ED.

38. ED is an agency subject to FOIA and must therefore release in response to a FOIA request any non-exempt records and provide a lawful reason for withholding any materials.

39. ED is wrongfully withholding non-exempt agency records requested by Student Defense by failing to produce non-exempt records responsive to the FOIA Requests.

40. ED is wrongfully withholding non-exempt agency records requested by Student Defense by failing to segregate exempt information in otherwise non-exempt records responsive to the FOIA Requests.

41. ED's failure to provide all non-exempt responsive records violates FOIA.

42. Plaintiff Student Defense is therefore entitled to declaratory and injunctive relief requiring Defendant to promptly produce all non-exempt records responsive to the FOIA Requests and provide indexes justifying the withholding of any responsive records withheld under claim of exemption.

**REQUESTED RELIEF**

WHEREFORE, Student Defense respectfully requests the Court to:

(1) Order Defendant to conduct a search or searches reasonably calculated to uncover all records responsive to the FOIA Requests;

(2) Order Defendant to produce, within twenty days of the Court's order, or by such other date as the Court deems appropriate, any and all non-exempt records responsive to the FOIA Requests and indexes justifying the withholding of any responsive records withheld under claim of exemption;

(3) Enjoin Defendant from continuing to withhold any and all non-exempt records responsive to the FOIA Requests;

(4) Award Student Defense the costs of this proceeding, including reasonable attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); *and*

(5) Grant Student Defense such other relief as the Court deems just and proper.

Dated: October 30, 2019

Respectfully submitted,

/s/ Robyn K. Bitner

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\*Application for admission to D.D.C. pending